



**Luziki Holdings Limited v British American Insurance (K) Ltd &  
2 others (Civil Case E139 of 2018 & 180 of 2016 (Consolidated))  
[2022] KEHC 20 (KLR) (Commercial and Tax) (27 January 2022) (Ruling)**

Neutral citation: [2022] KEHC 20 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E139 OF 2018 & 180 OF 2016 (CONSOLIDATED)**

**WA OKWANY, J  
JANUARY 27, 2022**

**BETWEEN**

**LUZIKI HOLDINGS LIMITED ..... APPLICANT**

**AND**

**BRITISH AMERICAN INSURANCE (K) LTD ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH MUNGAI GIKONYO T/A GARAM INVESTMENT  
AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**PATRICK KARANJA NGUGI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The applicant herein, Luziki Holdings Limited, filed the application dated 20<sup>th</sup> September 2021 seeking the following orders: -
  1. Spent.
  2. THAT pending the hearing and determination of this Application, the Honorable Court be pleased to stay the execution of the consent orders recorded in court on 19<sup>th</sup> May,2021.
  3. THAT pending the hearing and determination of this suit, the Honorable Court be pleased to set aside the consent orders recorded by the 1<sup>st</sup> and 3<sup>rd</sup> Defendant/respondents on 19<sup>th</sup> May 2021 and/or other consequential orders emanating therefrom.



4. Any other order as it may deem fit and expedient for the honorable court to grant in the circumstances.
  5. Costs of this suit be provided for.
2. The application was supported by the affidavit sworn by the applicant's Managing Director Mr. Fredrick Kimemia Kimani and is premised on the grounds that: -
- a. On the 19<sup>th</sup> May, 2021 the matter herein came up for mention before the Hon S. Githongori, Deputy Registrar for mention to confirm filing of submissions by the 3<sup>rd</sup> defendant in respect to the Applicant's notice of Motion application dated 22<sup>nd</sup> September, 2020.
  - b. Instead of abiding by the purpose of the mention, the 1<sup>st</sup> and 3<sup>rd</sup> Defendant took the advantage of the absence of the plaintiff's counsel and misled the Honorable court to adopt a consent order whose purport has far reaching consequence on the plaintiff's stake on the suit.
  - c. From the reading of the consent order, the 1<sup>st</sup> defendant has purported to sell to the 3<sup>rd</sup> defendant the suit property by extending the period within which the 3<sup>rd</sup> defendant will pay to the 1st defendant the balance of the purchase price for the property resulting from the auction sale of 16<sup>th</sup> May, 2016 the subject of the current suit.
  - d. That this action is not only irregular but grossly contemptuous of the ongoing court process as the said suit premises Mavoko Town Block 12/326 forms the substratum of the suit and its attempted sale to the 3<sup>rd</sup> defendant is a scheme by the respondent to render the ongoing suit nugatory and of no consequence.
  - e. Further, the applicant's interest in the suit premises will be defeated exposing the applicant to insurmountable loss and damages that cannot be compensated by way of damages because the applicant is the rightful owner of the property in possession after being declared the highest bidder in an auction conducted by the 2nd defendant/respondent on 16<sup>th</sup> May, 2016.
  - f. That there is no basis known in law whatsoever that the 1<sup>st</sup> defendant can purport to enter a consent with 3<sup>rd</sup> defendant to dispose of a property in prevailing circumstances where there is a pending suit challenging and disputing the manner in which the public auction of 16<sup>th</sup> May, 2016 was conducted.
  - g. Further, there were interim orders of injunction that were granted in favor of the plaintiff restraining the defendants from disposing off the suit premises pending the hearing and determination of the application.
  - h. That the said application was yet to be determined and the mention of the 19<sup>th</sup> May, 2021 was to confirm filing of submissions by the 3<sup>rd</sup> defendant before the matter could be mention before the Honorable judge to take a date for ruling.
  - i. That the respondent's actions are an effort to undermine the honorable court's jurisdictional control and power over the suit premises until the case is heard and finally determined as donated to it under the doctrine of lis pendens and



this Honourable Court should refuse to be drawn into the mischievous acts of the defendants.

- j. It is mete and in the interest of the fair administration of justice to all that the purported consent entered on the 19<sup>th</sup> May, 2021 be set aside for being irregular and illegal.

3. The respondents filed Grounds of Opposition in response to the application in which they listed the following grounds: -

- a. The Application is Res Judicata as the Suit Property and in particular the interests of the Plaintiff/ Applicant have been heard and finally determined in a Court of Competent Jurisdiction in Nairobi HCCC No. 617 of 2009 Florence Wangu Mwangi & 2 Others –v- British American Co. Ltd & 3 Others.
- b. The Application suffers material non- disclosure thus an abuse of the Court Process.
- c. The Applicant has deliberately pleaded on falsehoods thus guilty of Perjury.
- d. The 3rd Defendant/ Respondent will suffer irreparable harm if the Plaintiff's Application is allowed as it is settled that the 3rd Defendant/Respondent is the bona fide purchaser of the Suit property by Public Auction.
- e. The Notice of Motion dated 20th September, 2021 is scandalous; vexatious and an abuse of the Court Process and should be struck out with costs to the Defendants.

4. The application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the setting aside of the consent recorded on 7<sup>th</sup> May 2021.

5. The applicant's case was that the respondents' advocate took advantage of its advocate's absence and recorded the impugned consent when the matter came up for mention to confirm the filing of submissions. According to the applicant, the consent had the effect of allowing the 1<sup>st</sup> defendant to sell the suit property to the 3<sup>rd</sup> defendant by extending the period within which the 3<sup>rd</sup> defendant was to pay the purchase price. The applicant contends that the said action was grossly irregular as it had the effect of rendering the ongoing suit nugatory.

6. The respondents, on the other hand, argued that the application is res judicata and further, that the applicant lacks the locus standi to institute it. The respondents argued that the application is res judicata as case had been tried before a competent court in the case Nairobi HCCC No. 617 of 2009 Florence Wangu Mwangi & 2 Others vs British American Co. Ltd & 3 Others.

7. The respondents contended that 3<sup>rd</sup> defendant will suffer irreparable harm should the court allow the plaintiffs application as he is a bona fide purchaser of the suit property.

8. In *Samuel Wambugu Mwangi vs Othaya Boys High School Civil Appeal No. 7 of 2014 [2014] eKLR*, the court observed as follows regarding the setting aside of consent orders: -

“...Circumstances under which a consent judgment may be interfered with were considered in the case of Brooke Bond Liebig (T) Limited Vs Maliya (1975) E.A. 266. It was stated that



prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts or in general for a reason which would enable the court to set aside an agreement.”

9. In *Kenya Commercial Bank Ltd vs Specialized Engineering Co. Ltd [1982] KLR 485*, it was held that: -

- “ 1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.
2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.”

10. The same position was stated in *Hirani vs Kassam [1952] 19 EACA 131* where the Court of Appeal stated that: -

“It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in *J. M. Mwakio v Kenya Commercial Bank Limited Civ Apps 28 of 1982 and 69 of 1983*. In *Purcell v F.C. Trigell Ltd [1970] 3 All ER 671*, Winn LJ said at 676: -

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

11. From dictum in the above-cited authorities, it is clear that a consent order has the force and effect of a contract. This means that a consent order cannot be set aside or varied unless the applicant establishes that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court. The consent may also be set aside where it was given without sufficient material facts or in misapprehension or ignorance of such facts in general or for reasons which would enable the court to set aside an agreement. The applicant’s case is premised on the grounds that the consent was given without sufficient material facts.

12. The applicants case was that the 1<sup>st</sup> defendant could not purport to enter into a consent with the 3<sup>rd</sup> defendant when there was already a suit disputing the manner in which the public auction was conducted.

13. The respondents’ case was that the suit is res judicata. Section 7 of the [Civil Procedure Act](#) provides that: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between



parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

14. A perusal of the court record reveals that the applicant filed an application for injunction in the case Nairobi HCCC No. 617 of 2009 Florence Wangu Mwangi & 2 Others vs British American Co. Ltd & 3 Others seeking to restrain the defendants from advertising the suit property for sale by public auction. In the said case, the court held that the equity of redemption was extinguished at the fall of the hammer as the 3<sup>rd</sup> defendant had already purchased the property.
15. I note that the impugned consent order relates to the transfer of the amount owing to the 1<sup>st</sup> defendant. The applicant’s suit, on the other hand, challenges the manner in which the auction was conducted and I find that should it succeed, the only remedy available to the applicant will be in the form of award of damages.
16. My further finding is that the issue of ownership of the subject property is res judicata as the court had already pronounced itself over the same.
17. In sum, I find that the applicant did not place any material before the court to justify the setting aside of the impugned consent. Consequently, I dismiss the instant application with costs to the respondents.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 27<sup>TH</sup> DAY OF JANUARY 2022 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17<sup>TH</sup> APRIL 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of: -**

**Ms Waweru for Orengo for Plaintiff/Applicant.**

**Mr. Kigata for Gichuhi for 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents.**

**Mr. Onani for Karoki for 3<sup>rd</sup> Defendant.**

**Court Assistant: Margaret**

